Journal of Social Sciences, 1(2):59-66,2012 ISSN:2233-3878

"Real Rights of Realisation"

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Abstract

The article examines the main legal issues regarding the real rights of realisation according to the Georgian law. The 1st part of the paper is dedicated to the pledge as a security right (the means of security of an obligation) on movables and transferable intangible property, by which the pledgee shall be entitled to satisfy his claim from the object of pledge in preference to the other creditors of the debtor. According to manner of creation there are 2 kinds of pledge: legal pledge and contractual pledge.
The 2nd part of the research is dedicated to the mortgage. Like pledge, mortgage is the means of security of an obligation, by which the mortgagee shall be entitled to satisfy his claim from the object of mortgage in preference to the other creditors of the debtor. However, unlike pledge, the objects of mortgage are the immovable property as well as the rights (real rights) that are connected with the ownership of a plot of land (for instance, superficies, usufruct); furthermore, mortgaging is not related with transfer of the object of mortgage into the mortgagee's possession, which enables the debtor (the owner) to use it.

Keywords: accessory right, extinguishment, enforcement letter, mortgage, security right, pledge, public registry, rank of the pledge, substitution

Introduction

Unlike the German Civil legislation, the Georgian law is not notable with diversity of ***real rights of realisation*** – the means of security of an obligation; the Georgian law did not adopt the German land charge (Grundschuld) and annuity land charge (Rentenschuld). The authors of the Civil Code of Georgia have made a simple decision and received only 2 legal institutes as means of security of an obligation: 1) ***pledge*** in regard to the movables as well as claims and rights related to the movable property and 2) ***mortgage*** in regard to the plots of land and other immovables. The Civil Code of Georgia unites the provisions regulating the real rights of realisation in one chapter – "Property as a security for a claim". (German Law Archive, 2012, Chapter 6, Articles 254-310)

Both rights – pledge and mortgage are ***limited real rights, which are created on a property for securing a claim***. In certain cases, in particular, when the undertaken obligation is breached, the encumbered property is subject to realisation. Like in case of the ownership and other real rights, two main principles of the Law of Property apply to pledge and mortgage as the security rights: principle of specificity (determination) and publication. According to the first principle, the security right may encumber - and exist only on – a specific (determined) thing; however, in regard to the movables, the pledge can be created on an aggregation of things (universality of things) as well as on the whole movable thing. Publication enables third persons to take notice of a possible existence of the security right. In case of possessory pledge, publication is achieved by transferring the movables into the creditor's (pledgee's) possession. In case of a registered pledge or a mortgage, publication is achieved by registration of the security right in the Public Registry.

Pledge

Notion and content of the pledge. Secured claim and the object of pledge

Notion of the pledge is provided in parts 1 and 2 of the Article 254 of the Civil Code of Georgia; besides, provision of part 1 has been amended in 29.06.2007. Final versions of the provisions of ***parts 1 and 2 of the Article 254*** are as follows:

"A movable thing or/and transferable intangible property belonging to the debtor or third party may be used as security for a pecuniary as well as non-pecuniary claim in such a manner that the creditor (pledgee) shall be entitled to satisfy his claim by selling the object of pledge or if agreed between the parties – by appropriating the object of pledge in case of non-performance or improper performance of the obligation by the debtor. The pledgee has the right to be paid in preference to the other creditors of the debtor from the object of pledge". (Civil Code of Georgia, 2001)

As it is apparent from the definition, ***pledge is a security right (the means of security of an obligation)***, by which the pledgee shall be entitled to satisfy his claim from the object of pledge in preference to the other creditors of the debtor either by selling the object of pledge or by appropriating the object of pledge (in case of the direct agree-

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Journal of Social Sciences, 1(2):59-66,2012 ISSN:2233-3878

ment between the parties). The participants of the pledge relationship are, on the one hand, a creditor in the obligatory relationship – ***pledgee*** and, on the other hand, a debtor if the object of pledge belongs directly to the debtor or a third person who pledges his movable thing or intangible property for securing the obligations undertaken by the debtor ***(pledgor)***. Pledge always secures a certain obligation and, therefore, it neither can arise nor exist without this obligation; i. e. ***pledge is an accessory right.*** However, there is a provision in the mentioned Article 254, which deviates in some way from this principle. In particular, according to part 3, pledge can be created for securing a future or conditional claim. Future as well as conditional claims are not deemed arisen until occurrence of the certain circumstance – a particular date or event. Because there exists no claim, therefore, the right of pledge shall not be deemed as created; however, the law makes an exception in this case and considers the right of pledge as created immediately from the moment of agreement between the pledgee and pledgor and transfer of the thing into the pledgee's possession (or in case of the registered pledge – from the moment of registration of the agreement in the Public Registry).

It is not required the secured claim to be a pecuniary one (loan, credit, purchase price). It is admissible that a non-pecuniary claim will be secured by pledge provided that conversion of such claim in money is possible since as a result of realisation of the object of pledge the pledgee receives a sum of money, which shall be directed to discharge of a debt. The main goal of pledge intended by law could not be achieved if there were no monetary equivalent of the secured claim.

The object of pledge can be the movables as well as transferable intangible property. By encumbering the movables with pledge, the last extends to all essential parts of the thing; however, it shall not be extended to the accessories, which can be subject to separate pledging. Pledge may be created only such transferable intangible property – rights and claims, which are not related to the plot of land or other real estate and shall be deemed as movables (for instance, obligations and other personal property).

The object of pledge can also be not only the existing movables, rights and claims but the same objects, which will come into existence in the future or which will be acquired by the pledgor in the future. Contrary to the principles applied in case of securing ***the future or conditional claims***, according to which, as we have already indicated above, the right of pledge is deemed as created from the moment of agreement between the pledgee and pledgor and transfer of the thing (or the moment of registration), – pledge on the future property is deemed as created not from the moment of agreement but from the moment of coming into existence of the property or acquiring it by the pledgor (Civil Code of Georgia, 2001, Part 5, Article 254).

Types of pledge. Creation of pledge

According to manner of creation there are 2 kinds of pledge:

a) legal pledge;

b) contractual pledge.

The legal pledge arises by operation of law and it is always related to securing the particular claim. For instance, according to the Article 568 of the Civil Code of Georgia, for securing a claim arising out of the lease relationship, the lessor of a real estate has a right of pledge on movable things brought by the lessee to the place. The pledge is cancelled upon removal of the things from the leased premises if this is done in the ordinary course of life. According to the Article 634 of the Civil Code of Georgia, for securing his claims the contractor may exercise the right of pledge on a movable thing manufactured or repaired by him if this thing is in his possession. It is apparent that the law attributes the creation of pledge not only to the existence of a claim but – also to the fact of possession of the movables by the creditor.

The contractual pledge is of the 2 kinds:

a) ***possessory pledge;***

b) ***registered pledge.***

The possessory pledge can be created by making the agreement between the pledgor and pledgee on encumbering the movables with the right of pledge (pledge agreement) and transferring the movables into the pledgee's possession (Civil Code of Georgia, 2001, Part 1, Article 257). The law directly indicates to a real agreement on creation of pledge, which, as a rule, is made orally, however, the parties may also make the real agreement in writing. Transfer of the movables into the pledgee's or a third person's possession who is nominated by the pledgee is the second pre-condition for creation of pledge, which is reached by transferring the thing into a person's direct possession; the pledgor cannot retain the possession but he can remain as a detentor for benefit of the pledgee. Transfer can also be achieved by so-called traditio brevi manu: according to part 2 of the Article 257 of the Civil Code of Georgia, if the object of pledge is already in pledgee's or other person's possession entitled by the pledgee, for creation of pledge the agreement between the parties is sufficient.

A special kind of possessory pledge is ***pledging in pawnshop***. The last is regulated by the provisions, which apply to the possessory pledge with the exceptions provided in the Article 260 of the Civil Code of Georgia. In particular, the law provides the mandatory written form for the real agreement on encumbering the movables with the pawnshop pledge; non-compliance of the written form leads to ineffectiveness of the agreement. The second special provision in regard to pledging in pawnshop is not mandatory and is subject to adjustment by the agreement between the parties: unless otherwise agreed, the pawnshop's pecuniary claim against the debtor shall be extin-

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guished also in case when the proceeds from sale of the object of pledge cannot fully cover the outstanding debt.

Unlike the possessory pledge, in case of ***registered pledge*** transfer of the movables into the pledgee's or third person's possession is not required; as we said before, in case of registered pledge, publication is achieved by registration of the pledge in the Public Registry. The agreement on encumbering the movables with the registered pledge itself must be made in writing (Civil Code of Georgia, 2001, part 1, Article 258); like the provisions applied to pledging in pawnshop, in case of non-compliance with the written form, the agreement is null and void.

In regard to the movables (corporeal things), the participants of the private law relations ***can freely choose*** between the possessory or registered types of pledge but they have no such option in case when the object of pledge is a right or claim; in particular, the last can be pledged only in compliance with the procedure established in regard to the registered pledge (written agreement between the parties and registration of this document in the Public Registry). In addition, according to part 2 of the Article 259 of the Civil Code of Georgia, a debtor of the pledged claim must be notified in writing about encumbering the claim with pledge; before notification the debtor is entitled to perform his obligation towards the holder of the claim.

Determination of Rank of the Pledge

If ***the same object of pledge is encumbered with several rights of pledge***, it is vital to establish the priority among them. Part 1 of the Article 267 of the Civil Code of Georgia provides the general rule, according to which in case of competition among the rights of pledge, ***the right created firstly shall prevail***, i. e. rank of the rights of pledge is determined according to the moment of their creation. However, from this general rule the same article provides exceptions:

a) the first exception is the ***procedure of creation of pledge on the future property***, according to which, as we have already discussed above, the right of pledge shall be deemed as created not from the moment of agreement but from the moment of coming into existence of the property or acquiring it by the pledgor;

b) the second exception is provided in part 3 of the Article 267 of the Civil Code of Georgia, according to which ***the legal pledge shall prevail over the contractual pledge*** when the first is created under the following obligatory relations: lease (Article 568), usufructuary lease (Article 586), agricultural lease (Article 596), contract for work (Article 634), carriage (Article 685) and warehouse storage (Article 796).

Legal relations between the pledgee and pledgor

Under the pledge agreement ***an obligatory relation*** arises between the pledgee and pledgor. This relation exists automatically by operation of law and for its creation a direct agreement between the parties is not required unless otherwise provided by law.

The rights and obligations between the pledgee and pledgor differ from each other depending on whether the parties have made the possessory or registered pledge.

In case of possessory pledge, the main obligation of the pledgee (or third person) is to ensure the proper conditions of storage and maintenance of the movables. If this obligation is violated, the pledgor may demand to transfer of the object of pledge to his or to a third person's possession (Civil Code of Georgia, 2001, parts 1 and 4, Article 261). The pledgee cannot demand the benefits from the object of pledge unless otherwise agreed by the parties. However, it is presumed that the pledgee is entitled to get the fruits from the object of pledge if it is naturally fruit-bearing.

In case of registered pledge, the obligation to ensure the proper conditions of storage and maintenance of the movables is borne by the pledgor as the object of pledge remains in the pledgor's possession. Just as in case of violation of the analogous obligation by the pledgee, the latter may demand to transfer of the object of pledge to his or a third person's possession. However, unlike the rules regulating the procedure of deriving benefits by the pledgee, the pledgor is entitled to derive them from the object of pledge, for which the direct agreement between the parties is not required; such decision of the legislator corresponds to the substantial goal of the registered pledge: to enable the debtor (pledgor) to continue making use of the object of pledge.

According to part 5 of the Article 261 of the Civil Code of Georgia, if the object of pledge is ***a share in the commercial legal person (company)***, then the pledgor shall act in good faith while making the decisions in regard to management of the company taking into consideration his and the pledgee's interests.

Transfer of the right of pledge. Alienation of the object of pledge and its further pledging. Subrogation

We have indicated above that the right of pledge is an accessory right and ***it follows the secured claim when the last is assigned*** by the creditor to another person. Transfer of the right of pledge independently, without simultaneous transfer of the claim, is not permissible. Besides, in order to transfer the right of pledge to a new creditor just making assignment agreement is not sufficient; additionally, a publication factor shall be complied with: in case of possessory pledge – transfer of the right of pledge into the pledgee's or

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third person's possession and in case of registered pledge – registration of the pledge in the Public Registry. If as a result of the assignment of claim transfer of the right of pledge is excluded, then the last is extinguished.

The pledged thing is ***subject to alienation by its owner*** despite the fact that it is the means of security of an obligation and the last is not matured yet. The Civil Code of Georgia regulates in detail (Article 274) the legal issues arising in case of alienation of the pledged thing. Firstly, it is noteworthy that alienation of the object of pledge does not require the pledgee's content. The pledgor (owner) can freely sell, donate, exchange or otherwise alienate the pledged thing but ***the acquirer will get the movables encumbered with the pledge unless***:

a) in case of possessory pledge, the pledgor or entitled third person transfers the object of pledge into the acquirer's possession;

b) the pledgor (owner) alienates the pledged thing in the course of his standard business activities. Besides, it does not matter whether the acquirer was aware of the pledge or not. However, the above rule does not apply if the acquirer and pledgor acted in bad faith (Civil Code of Georgia 2001, Part 4, Article 274).

The provisions regulating the pledge enable the parties of the pledge agreement to stipulate ***the exclusion of the right to alienate and further pledging*** of the object of pledge; besides, in case of violation of the obligation to exclude alienation of the object of pledge and its further pledging by the pledgor, the law allows the pledgee to demand immediately satisfaction of his claim at the expense of the object of pledge.

If the object of pledge is a claim and the debtor of the claim performs his obligations during the existence of the pledge on the claim, then the result of the performance – so-called ***subrogation*** takes place of the claim provided that there is a direct agreement of the parties on it. In addition to the above, subrogation also takes place in cases when loss, damage or devaluation of the object of pledge results in the certain compensation (for instance, insurance compensation when the object of pledge is insured). However, in this case pre-condition of subrogation is the direct agreement too (Civil Code of Georgia, 2001, Part 2, Article 264).

Sale of the Object of Pledge

The Civil Code of Georgia provides ***the most flexible and effective procedure of selling the object of pledge*** taking into consideration the interests of all participants of the pledge relation. The Georgian legislator has paid special attention to the actual protection of the pledgee's interests, for instance, by permitting the pledgee to sell the object of pledge directly or upon an enforcement letter issued by a notary public as well as by allowing the different kind of procedure for realisation of the object of pledge.

As a result of amendments in the Civil Code of Georgia made by the law adopted in June 30th, 2007, the Civil Code of Georgia has been supplemented with a new article 260, which allowed ***the direct transfer of the pledged thing into the pledgee's ownership***. By such decision the Georgian legislator fundamentally changed his initial position, according to which a clause between the parties allowing the direct transfer of the pledged thing into the pledgee's ownership was declared void (Civil Code of Georgia, 2001, article 270 of the old version). According to the Article 260, the direct transfer of the pledged thing into the pledgee's ownership is allowed only in regard to the registered pledge; besides, such clause must be directly stipulated in the pledge agreement.

If the debtor violates the obligation secured with the pledge, the pledgee is entitled to sell the object of pledge. If the proceeds from sale of the object of pledge are not sufficient to discharge the debt secured or the value of the object of pledge cannot cover the claim, then ***the debt is deemed fully discharged unless otherwise agreed by the parties***. In our opinion such decision of the Georgian legislator should be considered as correct because the pledgee must not be deprived of the possibility to satisfy the unpaid part of his claim by other means even if he failed to agree on the contrary at the moment of making the pledge agreement.

From the first the law creates ***favourable conditions for the pledgee*** who is entitled to sell the object of pledge to exercise his rights. In particular, he may demand the delivery of the object of pledge to him, which shall be performed immediately. Additionally, according to the part 2 of the Article 281 of the Civil Code of Georgia, if sale of the object of pledge depends upon carrying out any legal action, then the pledgee may demand from the pledgor to perform such action. If the pledgor fails to comply with such demand within two weeks, the pledgee shall be entitled to perform the action towards third persons on behalf of the pledgor.

As regards ***the procedure of sale the object of pledge itself***, the law obliges the pledgee to comply with two special formal procedures in order to assure the lawfulness of sale the object of pledge, which differ from each other depending on whether there is the possessory or registered pledge. In case of possessory pledge, the pledgee shall notify in writing the pledgor and other pledgees (if any) of sale of the object of pledge two weeks prior to sale. However, part 3 of the Article 282 of the Civil Code of Georgia provides an exception from this general rule; in particular, sale of the object of pledge may take place by the pledgee without the written notice to the pledgor in the following circumstances:

a) if there is an imminent threat of fall in the movables' market or exchange price;

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b) if the object of pledge is perishable.

From the various modes of realisation of the object of pledge the law primarily specifies ***the direct sale by the pledgee***; the latter sells the movables at his discretion, however, the law provides the general requirements, which must be met during the sale. In particular, the pledgee shall sell the object of pledge at the fair and reasonable price taking into consideration his, pledgor's and other pledgees' interests. In case of violation of this obligation, the pledgee shall liable for damages incurred by the pledgor and other pledgees (part 1 of the Article 283 of the Civil Code of Georgia). If the object of pledge has a market or exchange price, the pledgee may commission its sale to a special trading institution.

Next important mode of realisation of the object of pledge in case of registered pledge is its transfer into the pledgee's possession and sale ***upon an enforcement letter issued by a notary public***. By this means the law provides a quite simple but very effective way to satisfy on time the pledgee's interests, especially in cases when the pledgor in possession refuses to hand over the object of pledge to the pledgee for realisation. The enforcement letter is issued by the notary at the request of pledgee without any trial and/or judicial decision and it is subject to law enforcement in accordance with the general enforcement procedure.

The parties of the pledge agreement may agree on a ***different procedure of realisation of the object of pledge***, which is not regulated in the Articles 254-310 of the Civil Code of Georgia. However, the prerequisite of such procedure is to sell the object of pledge at the fair and reasonable price taking into consideration pledgor's and other pledgees' interests (Civil Code of Georgia, 2001, part 2 of the Article 284).

When a movable thing ***is encumbered with two or more rights of pledge***, the law provides in this case special procedure for realisation of the object of pledge; in particular, sale may be demanded by the pledgee whose secured obligation is matured despite the fact that his right of pledge is not a first-ranking right. According to part 2 of the Article 279 of the Civil Code of Georgia, the higher-ranking pledgee within two weeks after receiving the written notice of the possible sale from the lower-ranking pledgee exercising the right of realisation may notify the latter that he intends to exercise such right; in this case the lower-ranking pledgee is not entitled to sell the object of pledge; in addition, the higher-ranking pledgee notifies the lower-ranking pledgee that he consents to realisation of the object of pledge by the lower-ranking pledgee provided that his claim will be satisfied preferentially from the proceeds of sale.

The legal result of lawful sale of the object of pledge is ***its transfer into the acquirer's ownership***; the right of pledge is extinguished. Even in case of unlawful sale of the object of pledge the acquirer acquires the ownership provided that he is in good faith in regard to the fact of illegality of sale (Civil Code of Georgia, 2001, Part 2, Article 285). As a rule, the acquirer obtains the object of pledge "clearly", i. e. unencumbered. However, there is an exception from this general rule, in particular, the object of pledge shall remain encumbered with the rights of the pledgees whose right of pledge is preferred than the lower-ranking pledgee exercising the right of realisation (Civil Code of Georgia, 2001, part 4, Article 279).

Extinguishment of the Right of Pledge

Since the right of pledge is an accessory right, ***it is extinguished*** if the obligation secured with the pledge is terminated. The right of pledge is extinguished also in case of so-called confusion when the ownership on the object of pledge ***is acquired by the pledgee.***

As a real right, pledge is also extinguished when its object is ***perished*** or the pledgee as an entitled person ***waives his right***. Besides, the possessory pledge extinguishes in cases when the pledgee returns the possession on the object of pledge to the pledgor.

According to the Article 265 of the Civil Code of Georgia, the right of pledge is extinguished if there takes place ***a processing of the object of pledge or its combination (connection)*** with other movables so that the restoration of these things in previous condition is impossible or it is connected with material expenses, however, the parties may agree on reservation of the right of pledge too.

In case of possessory pledge the law provides ***special ground for extinguishment of the right of pledge***, in particular, the last extinguishes if in case of assignment of the claim secured with pledge the new creditor does not demand to transfer of the object of pledge to him or to a third person entitled by him or registration of the right of pledge (Civil Code of Georgia, 2001, Part 2, Article 269). In case of extinguishment of the right of pledge the possessory pledgee shall return the object of pledge to the pledgor.

In case of extinguishment of registered pledge the pledgor may demand from the pledgee ***an immediate registration of cancellation of pledge*** in the Public Registry. If the pledgor does not demand the immediate registration of cancellation of pledge, the pledgee is nevertheless obliged by operation of law to apply to the Public Registry for cancellation of pledge within 5 working days after extinguishment of pledge. If the pledgee violates this obligation, the pledgor may demand from pledgee compensation for damages incurred by the pledgor (Civil Code of Georgia, 2001, Part 2, Article 275).

According to part 3 of the Article 275 of the Civil Code of Georgia, the pledgor may demand registration of cancellation of pledge in the Public Registry himself. In this case the application must be attached with a written document

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issued by the pledgee certifying the extinguishment of the right of pledge.

Protection of the Right of Pledge

As a real right the right of pledge is ***protected by law*** against third persons with the means of protection of the ownership – replevin and actio negatoria. In case of possessory pledge the pledgee may also protect his possession with possessory actions – (possessory) replevin and actio negatoria.

Mortgage

In general

The provisions of the Civil Code of Georgia regulating the legal institute of ***mortgage*** have been amended several times. Especially, the significant amendments and supplements have been made in Chapter 6 – "Property as a security for a claim" by the law adopted in June 29th, 2007; one can say that this law has completely renewed the provisions of this chapter regarding the mortgage (Civil Code of Georgia, 2001).

The most important innovation of the law of June 29th, 2007 is direct transfer of the mortgaged estate into the mortgagee's ownership if this is directly stipulated by the parties in the mortgage agreement. By legitimising the direct transfer of ownership the Georgian legislator's goal was to achieve the maximum protection of the creditor's (mortgagee's) interests; however, in this case the latter shall evaluate the mortgaged estate with the purpose of determining the amount of the pecuniary obligation to be repaid. In this regard it should be taken into account a provision of part 3 of the Article 300 of the Civil Code of Georgia, according to which by transferring the mortgaged estate into the mortgagee's ownership the claim shall be deemed as satisfied also in case when the value of the mortgaged estate cannot fully cover the outstanding debt unless otherwise provided by law or the agreement of the parties.

The law of June 29th, 2007 and further amendments in the Civil Code of Georgia provide ***the entirely innovative procedure of selling the object of mortgage***; in particular, the last takes place:

a) by ***auction***;

b) upon ***an enforcement letter issued on the basis of the court decision***, which is subject to execution by a law enforcement officer; besides, in the written agreement made between the creditor and the owner the parties may stipulate that the mortgaged estate shall be transferred into the mortgagee's possession and sold upon ***an enforcement letter issued by a notary public***. It is self-evident that in this case the mortgage agreement must be notarised.

c) ***different procedure*** of realisation of the object of mortgage (for instance, its direct sale by the mortgagee).

Notion and Content of the Mortgage

Like pledge, ***mortgage*** is the means of security of an obligation, by which the mortgagee shall be entitled to satisfy his claim from the object of mortgage in preference to the other creditors of the debtor. However, unlike pledge, the objects of mortgage are the immovable property as well as the rights (real rights) that are connected with the ownership of a plot of land (for instance, superficies, usufruct); furthermore, mortgaging is not related with transfer of the object of mortgage into the mortgagee's possession, which enables the debtor (the owner) to use it.

Mortgage is ***an accessory right***, however, its accessoriness is not strict; in particular, the creditor may rely on the registration of the mortgage in the Public Registry to prove the existence of his claim; and vice versa, in this case the debtor may not assert that the claim does not exist (Civil Code of Georgia, S. Article 297). Mortgage extends to all essential parts of the immovable property; however it shall not be extended to its fruits unless otherwise agreed by the parties. Like pledge, mortgage can be created for securing a future or conditional claim. In this case there exists no claim at the moment of making the mortgage agreement and, therefore, the right of mortgage shall not be deemed as created but security right registered in the Public Registry is considered as so-called ***owner land charge (Eigentümergrundschuld)*** (Civil Code of Georgia, S. Article 288 and German Civil Code, 2009, part 1177).

Types of mortgage

The Civil Code of Georgia distinguishes the following types of mortgage:

a) ***standard (negotiable) mortgage (Verkehrshypothek)***, where the contents of the Public Registry are presumed to be correct in favour of the creditor and the debtor may not assert that the claim does not exist;

b)***Common mortgage***, where a claim is secured by a mortgage created upon several real estates. In this case each of those real estates is subject to use for satisfying the claim and the creditor has an option to satisfy his claim from any of the real estates or from all of them.

Creation and transfer of mortgage. Substitution of the secured claim

Like in case of any real right encumbering an immovable property, the provisions regulating the creation and transfer of the immovables ***apply to the mortgage too***; in particular, a written document shall be made between the parties and this document is subject to registration in the Public Registry.

The Civil Code of Georgia allows encumbering one and the same real estate with ***several rights of mortgage***.

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In this case the priority is established in accordance with the moment of creation of the rights of mortgage (registration in the Public Registry). Any agreement by which the owner of the real estate assumes an obligation not to alienate, use or otherwise encumber the immovable property is void (Civil Code of Georgia, 2001, part 4, Article 294).

Since the right of mortgage is an accessory right, by assigning the secured claim to another person ***the mortgage is simultaneously transferred to this person (assignee)*** too. The secured claim may also ***be substituted with another claim***; such substitution takes place by an agreement between the owner and the creditor and registration of this agreement in the Public Registry (Civil Code of Georgia, 2001, part 3, Article 286). The debtor's consent is not required.

Legal Relations Between the Mortgagee and Mortgagor

In case of mortgage ***there are 2 kinds of legal relation***, which are to be distinguished from each other; on the one hand, a real relation between the mortgagee and the owner of the real estate and, on the other hand, an obligatory relation between the mortgagee as creditor and the claim's personal debtor. In these relations the active part – mortgagee and creditor – is always one and the same person. As regards the passive part, on the contrary, the last may also be different persons; the owner can use his real estate for securing the obligation of other person's debt – the claim's personal debtor. In the German legal literature such owner is called "***real owner***" because he does not assume an obligation but he is liable with the mortgaged real estate (Sachenrect, H., Prüttung, 1991, 322-327); however, since during the period of mortgage the owner retains the possession and use of the object of mortgage, he is bound to maintain his real estate in proper condition. The law not only obligates the owner but also protects his interests by providing the right to file an objection against the secured claim. Besides, it is of no importance whether the owner of the object of mortgage is simultaneously the creditor' personal debtor; thus, the objection can also be filed by an owner who is not a personal debtor. It is evident that the law applies in this case to a fiction because, as a rule, a claim as well as an objection from an obligatory relation belongs only to the participants of this relation – creditor and debtor. In addition to the objection against the claim, the owner certainly may file an objection against the mortgage itself; for instance, the objection asserting that the mortgage has not been created owing to invalidity of the mortgage agreement or failure to its registration in the Public Registry (Sachenrect, H., Prüttung, 1991, 322-327). The owner can even satisfy the creditor himself when the secured obligation is matured or when the personal debtor is entitled to perform the obligation (Civil Code of Georgia, 2001, Part 1, Article 292).

The Civil Code of Georgia regulates the cases when in the internal relationship between the owner and the personal debtor ***the parties agree that the owner himself assumes the obligation to satisfy the creditor's claim***. This case takes place by further selling the mortgaged real estate so that there is an agreement between the parties of the sale-purchase agreement to retain the right of mortgage and assume the personal obligation of the seller for repayment of the sale price. The assumption of debt (delegation of debt) requires the consent of the creditor (Civil Code of Georgia, 2001, Article 204). If the creditor consents to the assumption of debt, he will have two debtors: the first – seller who as his personal debtor is responsible before the creditor with his whole property and the second – buyer who as an owner is liable with the object of mortgage (Sachenrect, H., Prüttung, 1991, 322-327). Such an agreement is mentioned in part 2 of the Article 298 of the Civil Code of Georgia, in particular, if in this case the debtor himself satisfies the creditor, he will be granted with a right of recourse against the buyer. Besides, a mortgage will be transferred to him for securing this right of recourse itself. If the creditor waives the right of mortgage, the personal debtor shall be released from debt to the extent that, without this disposition, he might have obtained compensation from the mortgage (Civil Code of Georgia, part 2, Article 299).

Conclusion

Pledge is a security right (the means of security of an obligation), by which the pledgee shall be entitled to satisfy his claim from the object of pledge in preference to the other creditors of the debtor either by selling the object of pledge or by appropriating the object of pledge (in case of the direct agreement between the parties). The object of pledge can be the movables as well as transferable intangible property. The object of pledge can also be not only the existing movables, rights and claims but the same objects, which will come into existence in the future or which will be acquired by the pledgor in the future. According to manner of creation there are 2 kinds of pledge: a) legal pledge; b) contractual pledge. The legal pledge arises by operation of law and it is always related to securing the particular claim. The contractual pledge is of the 2 kinds: a) possessory pledge; b) registered pledge.

Mortgage is the means of security of an obligation, by which the mortgagee shall be entitled to satisfy his claim from the object of mortgage in preference to the other creditors of the debtor. However, unlike pledge, the objects of mortgage are the immovable property as well as the rights (real rights) that are connected with the ownership of a plot of land (for instance, superficies, usufruct); furthermore, mortgaging is not related with transfer of the object of

Journal of Social Sciences, 1(2):59-66,2012 ISSN:2233-3878

mortgage into the mortgagee's possession, which enables the debtor (the owner) to use it. The Civil Code of Georgia distinguishes the following types of mortgage: a) standard (negotiable) mortgage (Verkehrshypothek), where the contents of the Public Registry are presumed to be correct in favour of the creditor and the debtor may not assert that the claim does not exist; b) common mortgage, where a claim is secured by a mortgage created upon several real estates. In this case each of those real estates is subject to use for satisfying the claim and the creditor has an option to satisfy his claim from any of the real estates or from all of them.

References:

German Law Archive, retrieved on June, 2012, from http://www.iuscomp.org/gla/

International Development (USAID) and IRIS Center, 2001, the Civil Code of Georgia, University of Maryland retrieved on July, 2012, retrieved from: http://humanrights.ge/files/code_civil.pdf

Saarbrücken, 2009, German Civil Code – BGB, Translation provided by the Langenscheidt Translation Service, juris GmbH

Sachenrecht, 1991, Ein Studienbuch von Dr. Dr. h. c. Karl Heinz Schwab. Fortgeführt von Dr. Hanns Prüttung, 23., neubearbeitete Auflage des von Friedrich Lent begründeten Werkes, C. H. Beck'sche Verlagsbuchhandlung, München

Additional Literature:

Australian Legal Information Institute, retrieved on June, 2012), from http://www.austlii.edu.au/

Austrian Institute of Technology, retrieved on July, 2012, from http://www.arcs.ac.at/DissDB/

Colorado General Assembly, retrieved on August, 2012, from www. leg.state.co.us

Dobbs Ferry, 1969, the Italian Civil Code, New York: Oceana Publications

Gierke, Otto von, Deutsches Privatrecht, Leipzig, Band 2, Sachenrecht, 1905

Introduction to Dutch law, third revised edition, Kluver law International, the Hague-London-Boston

Juristy database, retrieved no September, 2012, from http://www.juristy.ru/

Lehrbuch des Bürgerlichen Rechts von Dr. Ludwig Enneccerus, Dr. Theodor Kipp und Dr. Martin Wolff, Erster Band, zweite Abteilung: Recht der Schuldverhältnisse von Dr. Ludwig Enneccerus, Marnburg, R. G. Elmert'sche Verlagsbuchhandlung (G. Bramm), 1923

Literaturquellen zum deutschen, österreichischen und schweizerischen Privat- und Zivilprozeßrecht des 19. Jahrhunderts, retrieved on 2012, from DIGITALE BIBLIOTHEK. http://dlib-pr.mpier.mpg.de/

Ludwig Maximilians University of Munchen, retrieved on July, 2012, from http://www.tutorium-zivilrecht.de/

Manfred Wolf – Sachenrecht, 13. Auflage, München, 1996

Palandt, 2003, Bürgerliches Gesetzbuch, bearbeitet von Bassenge, Diederichsen, Edenhofer, Heinrichs, Heldrich, Putzo, Thomas, 62. neubearbeitete Auflage, C. H. Beck'sche Verlagsbuchhandlung, München

Palandt, 1993, Bürgerliches Gesetzbuch, bearbeitet von Bassenge, Diederichsen, Edenhofer, Heinrichs, Heldrich, Putzo, Thomas, 52. neubearbeitete Auflage, C. H. Beck'sche Verlagsbuchhandlung, München

Schwerpunkte, 1994, BGB-Sachenrecht von Dr. Harm Peter Westermann, 9 neubearb. und erw. Aufl. – Heidelberg: Müller, Jur. Verl.

University of Hull, retrieved on July, 2012, from http://www.hull.ac.uk